

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Vonage Holdings Corporation)	WC Docket No. 03-211
Petition for Declaratory Ruling)	
Concerning an Order of the Minnesota)	
Public Utilities Commission)	

Comments of Beacon Telecommunications Advisors, LLC

Beacon Telecommunications Advisors, LLC (Beacon) submits these comments in response to the Petition for Declaratory Ruling by Vonage Holdings Corporation (Vonage) Concerning an Order of the Minnesota Public Utilities Commission (MPUC).¹ Beacon is a regulatory, financial, and management consulting firm providing services to small, rural, and tribal incumbent local exchange carriers (LECs) throughout the United States.

Summary

On September 22, 2003 Vonage Holdings Corporation (Vonage) filed a petition requesting that the FCC preempt an order of the Minnesota Public Utilities Commission (Minnesota Commission) requiring Vonage to comply with state laws governing providers of telephone service, even though Vonage avers that it is a provider of information services (and not a telecommunications carrier or common carrier subject to Title II of the Communications Act of 1934). Specifically Vonage asks that the FCC find that certain specific E911 requirements imposed by the Minnesota Commission are in conflict with federal policies. Further, Vonage states that preemption is necessary because of the impossibility of separating the Internet, or any service offered over it, into intrastate and interstate components.

¹ FCC Public Notice released 9/26/03

While this issue is characterized as a purely technical issue, e.g., information service provider vs. common carrier, net protocol conversion, inability to differentiate intrastate and interstate components, this is more of a perception issue than a technical issue. The reason this is true is that the very precedents that Vonage relies upon are technically incorrect. For example, in the 1992 FCC *BellSouth MemoryCall* decision, the call forwarding described is not one call but technically was then and still is two distinct and severable messages so far as the network and billing are concerned. These precedents may still be proper, but not for technical reasons. Therefore it is inappropriate to depend on these precedents to buttress technical arguments. However, public policy and public perception may be viable arguments.

In the Communications Act of 1934, as amended paragraph 151, Congress indicated that “[f]or the purpose of regulating interstate and foreign commerce in communications, so as to make available, to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of **promoting safety of life and property** through the use of wire and radio communication ... is hereby created a commission to be known as the ‘Federal Communications Commission’ ... ” [emphasis added] Plain reading of this section would indicate that “promoting safety of life and property” is one of the main charges of the FCC. Recent FCC emphasis on making E911 available on a date certain with exceedingly limited extensions by wireless providers, both large and small, would clearly further this charge.

In addition, Vonage is clearly positioning itself to be an alternate phone company as witnessed to this statement on its web site, “Vonage is changing the way people think about communications by offering consumers and businesses high-quality digital phone service as an alternative to traditional phone service.” Needless to say, the public expects accurate E911 service from traditional phone service providers. They should expect nothing less from alternatives.

In this petition, Vonage is in essence requesting that the FCC ignore their past and very recent concerns regarding the rapid implementation of E911, e.g., wireless and ignore a plain reading of the very reasons Congress created the FCC in the first place – mainly “promoting safety of life”. Simply by the fact that Vonage petitioned the FCC for a Declaratory Ruling, implies that Vonage thinks that the FCC has jurisdiction. As such if the FCC turns its back on this opportunity to promote safety of life, it is clearly not fulfilling one of its basic responsibilities and may be needlessly putting the public safety at risk.

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On September 22, 2003, Vonage filed a petition for declaratory ruling to preempt an order of the MPUC that in essence would have required Vonage to provide 911 services on the same basis as any other provider of telephone service in Minnesota. Vonage clearly believes that the FCC has jurisdiction in this matter, otherwise it would not have petitioned the FCC.

The orders that Vonage cites for reaching this conclusion rely on the FCC's 1992 BellSouth MemoryCall² decision where the FCC declared, in essence, that for an interstate call that was call forwarded, both pieces, the original message and the call forwarded message were interstate. In essence the FCC reasoned that these two messages are in actuality one continuous call. This has been referred to as the "One Call Analysis."

From a Technical Standpoint, One Plus One Does not Equal One

The facts are that *BellSouth MemoryCall* – the call in question was (and is today) two messages not one call. The reason for this is that in order to have BellSouth's MemoryCall, call forwarding is required, e.g., call forwarding on busy, call forwarding no answer and in most cases a separate dedicated "mail box" telephone number is assigned that is the number that the incoming call is forwarded to. The key feature that allows Voice Messaging, or in this case BellSouth MemoryCall is call forwarding. More precisely it is the custom calling features of call forwarding on busy and call forwarding no answer that is used to take two separate and distinct services, i.e., an interstate call and MemoryCall, a separate, optional local service offering and combine them to create an end-on-end service.

² Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall*).

Despite what lawyers and economists may think, call forwarding generates a new call, thereby making MemoryCall two “calls”, not one call.³ In *BellSouth MemoryCall*, the situation described involved the services bought by distinct end users, not carriers. For example, MemoryCall is really two end-on-end services, each purchased by separate end users.⁴ This distinction would effectively differentiate between any end-on-end services where the “new” service is created by the actions of network providers rather than end users. For example, post divestiture, an interlata call would not be two jurisdictionally diverse services since the “end-on-end” services are provided by network providers, e.g., access portion provided by LECs and toll portion provided by IXC. There are and have been systems in place to make the technical and jurisdictional (including tariff, cost allocations and revenue) classification of this “end-on-end service” consistent. Such is not the case with MemoryCall.

To test whether MemoryCall/voice messaging is one call or two calls, which number shows up on the originating customers bill, the dialed number or the forwarded number?⁵ Another test might be to find out how are interstate access charges applied, assuming that the forwarded number is a local number?⁶ On the other hand, consider an interstate call that is forwarded to a location that is within the state, but is toll. How is it billed today?⁷ For extra credit, think about an intrastate toll call or even a local call that is call forwarded to an interstate number.⁸

So, contrary to how it is actually treated by the network and actually billed, what BellSouth MemoryCall said was that all interstate calls that are call forwarded are not two calls, but rather one continuous call. Public perception that could regard this end-on-

³ Technically a call becomes a message when it is completed. By definition a call is an uncompleted message. Therefore MemoryCall consists of two messages rather than two calls, because each call is completed. One call is completed to the called number and the second is completed to the forwarded number. Therefore MemoryCall cannot be two calls because one call would have to complete in order to generate the second. So technically it is either one message and one call or two messages. However, for the purposes of this filing, no such distinction will be made between a call and a message.

⁴ To really dust off some history, this is more like FX, CCSA where a local service is combined with either an interstate or intrastate private line service each purchased by end users to effectively create another service.

⁵ If it were in fact one continuous call, the “final” number might seem logical. Regardless the forwarded number is unknown to the originator of the interstate call.

⁶ Hint: there are no additional interstate access charges.

⁷ Hint – it is not billed as single call, nor are they both billed at interstate rates. In addition, the originator of the interstate call does not get billed the “toll” charges.

⁸ Is it possible to have “reverse contamination”?

end service as a single continuous call and/or policy reasons, e.g., thwarting of federal policy, could have come into play, but what is clear, is that technically from a network and also a billing standpoint, there are two calls not one.

The same is true for access to a private interstate network – which was the underlying network configuration in the FCC *Recip Comp Order*.⁹ This Order declared that local access to the Internet was one continuous call. Since the Internet (private network) was predominately interstate, so too must be the local access call per, in part, *BellSouth MemoryCall*.

How is a call billed today that accesses a database that is accessible via an interstate private network? A customer calls their local bank to check on their bank balance automatically. Assume the bank's database is located in another state; the balance information is accessed over the bank's private interstate data network. Per the logic underlying the Internet is interstate decision, this local call is really an interstate call because it is one call and connects to a private interstate network. The call to the bank will not magically become an interstate call and billed accordingly. In fact the local telephone company will have no knowledge that there was any interaction with the interstate private network. However, just as the dial up access to the Internet has unique numbers that could be identified, these numbers with the potential for access to a private interstate network could likewise be acknowledged. But they are not. Like it or not, while these calls may be declared to be jurisdictionally interstate, they are handled by the network and billed as if they are local.¹⁰

So in summary, technically the precedent case (*BellSouth MemoryCall*) as well as the *Recip Comp Order* was and is not today technically correct. Therefore there is limited, if any technical basis for these decisions.

From a Non-technical Standpoint, One Plus One Just Might Equal One

⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation of ISP-Bound Traffic, CC Docket 96-98, 99-68 Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (Released Feb. 26, 1999) (*Recip Comp Order*)

¹⁰ Just for fun, if local calls are not unlimited, but are measured, how are they billed – local or interstate?

In the *BellSouth MemoryCall* decision, the FCC surely knew then and knows now that there are two separate and distinct messages, as opposed to calls, involved in this “end-on-end” service. Since the FCC’s decision does not rest on solid technical grounds, there must be other overriding reasons for this decision.

One reason could have been the fun of preempting the states. But that surely could not be the case.¹¹ Other more likely reasons could have been public policy and public perception. In the *BellSouth MemoryCall*, there was concern about the states thwarting federal policies as well as the inseparability of interstate and intrastate.¹² In addition, it could be argued that the general public perception is that it is one continuous call, because there is no, or limited indication of the call actually being transferred. Regardless, of the reasons, it is clear that the reasons were not technical and that public policy and perhaps public perception overshadowed purely technical considerations.

Not Fair to Pick and Choose

If the rationale for the underlying decisions used by Vonage to even file the petition is not technically correct, it is hard to understand how this can be a purely technical issue, unless, of course, the FCC wants to correct the record and make these past decisions technically correct. Assuming that that will not happen, then public policy and public perception must be considered in this instance as well.

In the Communications Act, the General Provisions laid out the reasons for the Creation of the FCC in 1934. One of the reasons was “promoting safety of life and property”. The FCC has been adamant in their efforts to accomplish through such efforts as the provision of accurate E911 by wireless carriers. Vonage readily acknowledges that they do not provide E911. This might be acceptable if the public did not have the perception that Vonage was indeed a telephone company and have the reasonable expectation that

¹¹ If the FCC preempted the states just for the heck of it, they might not get invited to attend the NARUC meeting.

¹² Does this argument go over equally as well with the state and local taxing authorities? The jurisdictional separations concept of “extreme nicety not required” would seem to apply here.

Vonage, therefore provides all of the services expected to be provided by telephone companies. Accurate E911 is one of those expected services.

While Vonage does discuss the 911 limitations on distinct pages of their web site, it could be easily lost in the claims trumpeting that “Vonage is changing the way people think about communications by offering consumers and businesses high-quality digital phone service as an alternative to traditional phone service.” Nowhere does Vonage explain any increase safety risk, at least not in terms found on the back of cigarette packages.

As stated above, the technical underpinnings of the Vonage petition are not technically correct from a network and billing standpoint. While there may be some other overriding principle that applies, it is difficult to imagine it being more important than promoting safety of life and property. In fact if the FCC does not require that Vonage be able to provide E911 before providing services that the public believes are substitutes for traditional phone service, it would seem difficult to argue how the FCC is fulfilling one of its reasons for existence.

Based on the FCC’s own statements in its Order to Stay in “E911 Compliance Deadlines for Non-Nationwide Tier III CMRS Carriers” CC94-102, FCC03-2, released October 10, 2003 regarding the importance of E911 to public safety, the FCC may be putting the public’s safety in needless jeopardy.¹³

Conclusion

Beacon appreciates the Commission’s difficult task of balancing the need to allow a new technology to flourish with minimal regulatory intervention. However, minimal regulatory intervention does not include needlessly putting public safety at risk. It is difficult to imagine how any reading of the Act or prior Commission orders could be

¹³ “We believe that all American consumers, including those who live, work, vacation, in or travel through the least populated areas of the United States, should have comparable E911 wireless service. Because of the vital public interest in providing E911 service, the Commission will not grant relief from the implementation of its E911 rules unless extraordinary circumstances exist.” At paragraph 2

interpreted to allow this. The potential benefits do not seem to be worth the potential risks.

Respectfully submitted,

Beacon Telecommunications Advisors, LLC

[Filed Electronically]

Paul M. Hartman
Beacon Telecommunications Advisors
8801 South Yale Avenue, Suite 450
Tulsa, OK 74137

October 27, 2003